Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	**MM Docket No. 92-266**
Cable Television Consumer Protection	)	
and Competition Act of 1992:	)	
Rate Regulation	)	
	)	
Leased Commercial Access	)	**CS Docket No. 96-60**

To: The Commission - **Mail Stop 1170**

COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

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Introduction and Summary

1. These Comments are filed on behalf of the Community Broadcasters Association ("CBA") in response to the Commission's *Further Notice of Proposed Rule Making* ("FNPRM") in the above-captioned proceeding, FCC 96-122, released March 29, 1996. CBA is the trade association of the nation's low power television ("LPTV") stations and has participated actively in prior phases of this proceeding, urging the Commission to adopt rules that will result in reasonable prices for leased access and will lead to the development of a viable leased access market.

2. CBA applauds the Commission's recognition that the initial leased access rate regulation rules require change to fulfill the intent of Congress when it mandated leased access in the 1992 Cable Act.[1/] CBA also believes that the proposals in the FNPRM could lead to

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1/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See* Section 612(b) of the Communications Act, 47 USC §532(b).

workable and practical rates. However, CBA also believes that the proposed regulatory structure is too complex in the form presented in the FNPRM and that considerable simplification is needed to avoid creating a whole new series of disputes and litigation. Further, CBA believes that the Commission has placed more emphasis than is justified on avoiding any negative financial impact on cable operators and has not paid sufficient attention to the intent of Congress that leased access be used to diversify the voices available to the public and that cable carriage of local LPTV stations be encouraged. Finally, CBA urges the Commission to put real teeth into its regulations through the imposition of penalties for violation that are sufficient to have a meaningful deterrent impact.

General Rate-Setting Principles

3. The Commission has properly recognized that the existing leased access rates allow double-recovery by the cable operator -- recovery of costs from both the cable subscriber and the channel lessee. The proposed new formula attempts to avoid that result, and CBA believes that the formula can yield reasonable rates if properly applied.[2/]

2/ Notwithstanding the Commission's statement at par. 9 of the FNPRM that the purpose of its proposals is not to lower leased access rates, rates under the existing rules have not been reasonable in actual practice, so they must be lowered to meet the statutory test of reasonableness. The *American Heritage Dictionary* (3rd. Ed., Houghton Mifflin Co., 1992) defines "reasonable" as "not excessive or extreme; fair; [as in] *reasonable prices*." In previous phases of this proceeding, LPTV operators have told the Commission of demands by cable operators for literally millions of dollars a year for the lease of a channel; and in many instances, those demands appear to have been in compliance with the existing rules. Those prices are excessive and extreme, not fair; they are not "reasonable" and must be lowered to reasonable levels. CBA also strongly disagrees with the Commission's statement at par. 24 of the FNPRM that the economic viability of leasing activity is not an issue. If leasing is not economically viable, the intent of Congress that programming be presented on cable that is not subject to the cable operator's editorial control will not be fulfilled.

4. To make the formula work and produce reasonable results, however, the Commission must assume rational business behavior by cable operators when leasing channels. A rational cable operator who is not motivated by a desire to stifle leased access[3/] will offer to lease dark channels or its least profitable channels, because leasing will either improve the economic performance of those channels or at least result in the minimum reduction in the performance of the cable system as a whole. Thus, except in the unusual situation where a prospective lessee specifically requests placement on a premium tier, all calculations that lead to the maximum rate must be based on dark or least-profitable channels, even if the cable operator for some reason elects to displace a higher-profit channel to make space for leasing. This approach will prevent manipulation by cable operators for the purpose of discouraging the leasing activity that Congress has sought to facilitate.[4/]

5. Alternatively, to promote the leasing of channels for which unreasonable rates are or may be charged under the current rules, the Commission could set a very low fixed initial rate to be charged for leasing of the designated channels (i.e., three cents per subscriber per month). This rate will promote leasing of the channel, but would not prevent competitive bidding for the channel space in the event the demand for the channel space exceeded the available capacity.

3/ That anticompetitive motive was of specific concern to Congress. *See* par. 3 of the FNPRM and the citation at footnote 10 of the FNPRM.

4/ There may be no need to dictate to the cable operator which actual channels it must designate for leasing, as long as the maximum rate is based on dark or least-profitable channels, although CBA is concerned that cable operators might designate highly popular channels for the purpose of stimulating unjustified public outcry against any leasing at all.

6. Independent programmers, such as C-SPAN and CNN, who are already positioned on many cable systems, will undoubtedly express their concern at being bumped off cable systems if the channels they currently occupy are designated for leased access. While the FCC may sympathize with the programmers' alleged plight, the reservation of channels for leasing is a statutory decision by Congress that the FCC has no legal authority to change. In the Cable Act of 1992, Congress mandated that leased access rules and policies be implemented for several purposes, not the least of which was to promote diversity in the control of programming voices. The Telecommunications Act of 1996 did nothing to relieve the Commission's or the cable operators' leased access obligations under the Cable Act. The fact that the original leased access rules were, by the Commission's own admission, not as effective as originally anticipated does not give the Commission any authority, statutory or otherwise, to decide at this time to diminish or abolish the leased access rules or their purposes in an effort to protect currently carried programmers. On the contrary, it is the Commission's obligation to adopt workable rules to implement the statute.

7. Neither should the Commission attempt to justify *retention* of the current rules under the same guise of providing stability to cable operators and existing independent programmers. It is not as if these programmers and cable operators were not aware of the leased access obligations of the latter party at the time they negotiated programming agreements. Besides the fact that the Cable Act itself clearly mandates that a certain number of channels be designated for leased access on a given cable system, evidence appears in many programming contracts between cable operators and independent programmers, which, CBA believes, often contain a provision reserving the cable operator's right to bump the programmer off the channel in the event

that the channel must be designated and used for leased access. Forcing channel lessees to work now with rules which do not produce the results originally intended by Congress and with which the Commission itself has expressed serious concerns unfairly penalizes the lessee and should not be sanctioned by retention of the current rules.

8. Furthermore, in actual practice, as explained above, if cable operators act in a rational business manner in choosing which channels to designate for leased access, popular stations will not normally be bumped from the system. Under the proposed rules, if there is more demand for leased access channels than there is properly designated capacity, the potential lessees must bid for the available channels. CBA does not object to this principle of an open market where the demand for leased channels exceeds the supply. Thus, if an independent programmer wants to remain on a channel designated for leasing, or wants to be carried on the system for the first time by leasing channel space, it can compete for the channel space with any others who want to occupy that space. Additionally, this market approach to leasing actually benefits the cable operator, who in the end will be able to lease the channel for the maximum amount the market players will pay for it.

Administrative Simplicity

9. In an era of increased regulatory responsibilities and severe budgetary pressures, the Commission should always attempt to adopt regulations that will be self-policing to the maximum extent possible and will generate the fewest disputes requiring resolution by the Commission or the courts. The rules proposed in the FNPRM, however, run a substantial risk of leading to numerous disputes. The principal reasons for that risk are that the proposed rules (a) involve calculations based on information solely in the hands and under the control of cable

operators; (b) the calculations can be highly complex, especially in terms of determining what revenues are foregone when a channel is leased; and (c) the calculations are different for every cable system and sometimes different for different channels on the same system.

10. The Commission recently recognized the pitfalls of attempting to achieve economically theoretical perfection. In *Local Competition Provisions of the Telecommunications Act of 1996*,[5/] the Commission is considering how to determine "just and reasonable" rates for interconnection of new local exchange carriers with incumbents, including an element of "reasonable profit."[6/] While finding that long run incremental cost ("LRIC") would be a good standard, the Commission recognized that determining LRIC has practical and administrative problems because it would lead to contentious and time-consuming legal proceedings. Faced with a Congressional directive to allow new entrants to purchase unbundled elements and services at cost-based rates, the Commission determined that the rates should make it possible for competitors efficiently to enter the market, constrain the incumbent's ability to preclude efficient entry by manipulating cost allocations, and be as simple as possible to administer.[7/]

5/ CC Docket No. 96-98, FCC 96-182, released April 19, 1996 ("Interconnection Docket").

6/ Interconnection Docket at p. 40.

7/ Interconnection Docket at p. 52. The Commission has also recognized this "advantage of simplicity" in proposing that a given percentage figure be used in allocating costs of Open Video Systems ("OVS") between regulated telephony and unregulated new video and other services, instead of measuring amount of actual use of OVS plant for each service offered. CC Docket No. 96-112, FCC 96-214, released May 13, 1996.

11. Recognizing in the interconnection context that "it will be difficult for a regulatory agency to determine a carrier's actual opportunity cost,"[8/] the Commission is exploring concepts such as geographic and class-of-service rate averaging, a proxy for cost-based ceilings, and the use of generic or average cost data. The Commission has already used the average cost concept in cable rate regulation, in the context of the benchmark against which Cable Programming Service Tier rates are measured in rate complaint cases. It should seriously consider applying the same ideas to leased access.[9/] A proxy of some sort and/or averaging will eliminate the problem noted in the Interconnection Docket and OVS proceeding that without simple regulations, incumbents, who control information about their own costs, may withhold or restrict access to data or manipulate those costs to their advantage.[10/]

Economic Welfare of Cable Systems

12. The Commission has put too much emphasis in the FNPRM on avoiding any adverse impact on cable operators and too little emphasis on the multiple Congressional objectives of encouraging competition, remedying excessive market power by cable operators, dissemination

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8/ *Id.* Opportunity cost is also an element of the proposed leased access rate regulations.

9/ See, for example, the discussion at par. 5 *supra*.

10/ The Commission's proposal to require what in effect would be arbitration by a certified public accountant before filing a complaint with the agency would not simplify the rules, reduce the number of disputes, or reduce any burden on cable operators or channel lessees but would only transfer initial dispute resolution to the private sector, undoubtedly to the economic benefit of the accounting and legal professions.

of programming not under the cable operator's control, and program diversity.[11/] The only statutory admonition about the financial impact on cable operators is that leasing should be consistent with the growth and development of cable systems.[12/] There is no record in this proceeding of leasing activity ever having impaired the growth and development of the cable industry;[13/] on the contrary, the industry has an impressive growth record over a relatively short period of years since its inception. In contrast, numerous LPTV operators have provided evidence of continuing anticompetitive conduct by cable systems and attempts to undermine the working of the leased access rules.

13. Channel leasing, especially by local LPTV operators, fulfills all of Congress's intentions. It brings a new voice to the public, thereby increasing the diversity of programming sources; it stimulates competition in both the idea and advertising arenas; and it helps control abuses of market power by cable systems.[14/] Therefore, CBA urges the Commission to focus on

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11/ *See* the discussion and citations at par. 25 of the FNPRM.

12/ *See* Par. 25 and fn. 43 of the FNPRM.

13/ Any concern expressed by cable operators that they are not compensated under the proposed rules for any loss of subscribers which might result from the carriage of leased access programmers instead of alternative programming is unfounded and irrelevant. First, it is not reasonable to conclude that cable subscribers will drop their subscription to cable service because local or other programming is added to the system through leased access, especially if cable operators act rationally in designating for leased access those channels which are currently the least economically productive or least popular. In any event, because Congress mandated leased access without regard to or concern for potential subscriber loss, the Commission should not consider that element in this proceeding.

14/ There can be no doubt that cable systems have market power. They control classic bottleneck access to every television receiver to which their wires are hooked, as A/B switches are no longer required, most TV receivers today are marketed with just a single 75-ohm input, and TV receivers (continued...)

the stimulation of activities that Congress wishes to encourage and not to hesitate to move forward because of concern that cable operators may not be able to maximize revenue when they must lease channels.[15/]

Leasing Stability

14. The quality of leased access programming will suffer if channel lessees cannot depend on some stability in their leases. Moreover, members of the public should be entitled to some continuity in what they see on leased access channels. Accordingly, CBA urges the Commission to require cable operators to offer leases of at least five years in duration, at a fixed rate.[16/]

15. Cable systems should also be required to negotiate in good faith with lessees to renew channel leases, except where the lease is terminated for cause because of unlawful program content or the demand for leased access exceeds the supply. Even where demand exceeds supply, good faith renewal negotiations should be required as long as an incumbent lessee is willing to meet any price bid by another prospective lessee if demand exceeds supply. Additionally, existing

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14/(...continued)
hooked up to cable are normally set to tune in cable frequencies and not UHF broadcast frequencies. Thus a receiver hooked up to cable is for all practical purposes shut off from over-the-air reception.

15/ Congress has given cable systems many privileges, not the least of which is a compulsory copyright license that avoids what would otherwise be an impossible tangle to secure performance rights for the distribution of program signals and almost certainly results in lower copyright payments than would result in a completely free market. One of the prices for these privileges is the leasing of a few channels. Congress never stated that leasing should be no burden at all to cable operators. Moreover, if cable systems embrace leasing and make an effort to develop leased services, the end result should be an economic benefit to them.

16/ An annual cost-of-living adjustment would not be unreasonable.

channel leases should be kept in effect after this proceeding is concluded, but their rates should be adjusted downward if they exceed the level permitted by whatever rules are adopted in this proceeding.[17/]

16. As to timing, CBA urges that any new rules adopted in this proceeding be made effective immediately. Rates under the existing rules do not meet the test of reasonableness; so unless such rates also comply with the new rules, there is no reason to allow them to remain in effect any longer than necessary.

Preferential Treatment

17. It is not clear to CBA that preferential treatment by regulation for any lessee will ever be required, because if the demand for leased access exceeds the supply, the Commission has proposed to allow the free marketplace to set the rate. Therefore, in cases of channel scarcity, the choice of who gets to lease the channel will in effect be made by bidding.

18. However, in the event that there are no substantial differences among bidders, the intent of Congress clearly favors a preference for local program sources generally and LPTV stations in particular. As discussed above in these Comments, Congress has expressed its intent to promote the public interest by encouraging diversity and the carriage of LPTV stations specifically. There can be no greater diversity than local programming provided by an LPTV station. For this reason, to the extent that the demand for leased access exceeds the designated

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17/ Since the new rates are likely to be lower than the old rates, there should be no occasion where rates need be adjusted upward to the level permitted by new rules. If existing rates are lower, they were the subject of free-market negotiation between lessor and lessee and should be left undisturbed under contract law principles.

capacity, the Commission should mandate that at least twenty-five percent (25%) of the leased access channels on the cable system be leased to community-based groups and organizations which originate programming from local sources.

19. No preference should be given under the leased access rule to nonprofit or other noncommercial classes of entity. In particular, those groups should be not permitted to lease channels at lower rates than local LPTV stations or to obtain a lease if their bid is not the high bid in a situation where demand exceeds supply. Congress has provided separately for nonprofit and noncommercial groups to reach the public through Public, Educational, and Governmental ("PEG") channels, which may be required by a local franchise authority. These groups should not have preferred access to two groups of set-aside channels.

20. On the other hand, a negative priority should be given to entities seeking to lease more than one channel or to broadcast networks and stations with must-carry rights. If demand exceeds supply, the encouragement of diversity requires that each lessee be limited to one channel and that must-carry broadcasters, who have another means of access to cable viewers, not be able to tie up additional channels by leasing.[18/]

Enforcement

21. A serious problem with the existing rules has been that cable operators have not been under sufficient pressure to comply. The Commission's decision to require a response

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18/ There should be no impediment, of course, to an entity's leasing more than one channel or a must-carry broadcaster leasing a channel if the supply of leased channels exceeds the demand. However, if at a later date demand increases and new parties wish to lease, multiple-channel lessees and must-carry lessees should be displaced to make room.

within seven days to a leased access request[19/] has already yielded positive results. CBA urges the Commission to put teeth into its regulations, so that there will be greater incentive to comply, and fewer complaints from rejected lessees.

22. Remedies for noncompliance must go beyond simply orders to comply and should include forfeitures and penalties to the operator. For example, when a programmer contests the reasonableness of a quoted rate from a cable operator, both parties should be able to retain their own CPA (if they cannot agree on one) to determine, based on the procedure set forth in the rules, the correct rate that the operator should have quoted the programmer. If it turns out that the cable operator did not offer the programmer a good faith rate -- *i.e.*, the operator's quoted rate is more than ten or fifteen percent above the CPA's rate -- then the operator should be obligated to allow the programmer to lease at the reasonable rate, pay for the services of both CPAs, and refund to the programmer an amount equal to three times the excess charged (treble damages). The risk of such a penalty would encourage cable operators to interpret the Commission's regulations conservatively and to negotiate with channel lessees in good faith. On the other hand, if the cable operator's originally quoted rate is reasonable -- *i.e.*, within ten or fifteen percent of the CPA's rate -- then the programmer should be required to pay for both CPAs. This approach should deter programmers from frivolously contesting the cable operator's rates. Under this type of penalty system, a cable operator will not be adversely affected unless it quotes a grossly unreasonable rate to a potential programmer; and, if it follows the Commission's rules and the mandate of Congress, it has nothing to fear.

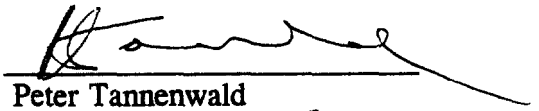
19/ *See* par. 13 of the FNPRM.

Conclusion

23. As the Commission well knows, the LPTV industry, together with others seeking to lease channels, has been extremely frustrated by the impracticality of the Commission's existing rules and the amount of time it has taken even to propose changes, let alone adopt them.[20/] The leasing system is broken and needs to be fixed.

24. The Commission has started along a potentially good path in the FNPRM. CBA urges the Commission to focus on the goals of simplicity, predictability and leasing stability, program diversity, and enforcement when it reaches its final decision.

Respectfully submitted,



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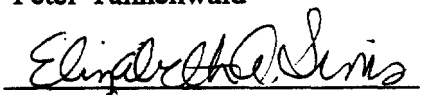

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20/ Earlier this year, CBA filed a motion with the U.S. Court of Appeals for the D.C. Circuit in support of the petition of ValueVision for a writ of *mandamus* to require the Commission to act on pending petitions for reconsideration of the leased access rules.